1	TIFFANY CHEUNG (CA SBN 211497)	
2	TCheung@mofo.com BONNIE LAU (CA SBN 246188)	
3	BLau@mofo.com JESSICA GRANT (CA SBN 178138)	
4	JGrant@mofo.com MORRISON & FOERSTER LLP	
5	425 Market Street San Francisco, California 94105-2482	
6	Telephone: 415.268.7000 Facsimile: 415.268.7522	
7	LYNDSEY H. CAIN (admitted pro hac vice)	
8	LCain@mofo.com MORRISON & FOERSTER LLP	
9	4200 Republic Plaza Denver, Colorado 80202 Talanhana 202 502 2226	
10	Telephone: 303.592.2226 Facsimile: 303.592.1510	
11	ERIN P. LUPFER (CA SBN 317994) ELupfer@mofo.com	
12	MORRISON & FOERSTER LLP 12531 High Bluff Drive	
13	San Diego, California 92130-2040 Telephone: 858.720.5100	
14	Facsimile: 858.720.5125	
15	Attorneys for Defendants MCKESSON TECHNOLOGIES INC. and	
16	MCKESSON CORPORATION	
17	UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA	
18	OAKLAND DIVISION	
19		Case No. 4:13-cv-02219-HSG
20	MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC.,	DEFENDANTS' OBJECTION TO
21	Plaintiffs,	REPLY EVIDENCE AND ADMINISTRATIVE MOTION TO
22	V.	STRIKE UNTIMELY AND NEW EVIDENCE AND ARGUMENTS
23	MCKESSON CORPORATION, MCKESSON TECHNOLOGIES INC.,	IN PLAINTIFFS' REPLY BRIEF REGARDING PLAINTIFFS'
24	and DOES 1-10,	INDIVIDUAL CLAIMS FOR TREBLE DAMAGES
25	Defendants.	Trial: January 10, 2022
26		Time: 10:00 a.m. Courtroom: 2, 4th Floor
27		Judge: Haywood S. Gilliam, Jr.
28		J

DEFENDANTS' MOTION TO STRIKE UNTIMELY AND NEW EVIDENCE AND ARGUMENTS IN PLAINTIFFS' REPLY BRIEF CASE NO. 4:13-CV-02219-HSG

NOTICE OF MOTION AND STATEMENT OF RELIEF

PLEASE TAKE NOTICE that pursuant to Local Rules 7-3(d) and 7-11, Defendants McKesson Corporation and McKesson Technologies, Inc. ("Defendants"), hereby move this Court for an order striking the belatedly-disclosed new evidence and new arguments that Plaintiffs McLaughlin Chiropractic Associates Inc. and True Health Chiropractic, Inc. ("Plaintiffs") raise for the first time in their Reply Brief On Treble Damages ("Reply Brief") (ECF No. 501).

I. RELEVANT BACKGROUND

On November 12, 2021, Plaintiffs filed their Brief on Treble Damages ("Opening Brief") (ECF No. 497). Plaintiffs argued in relevant part that "the Court should find that McKesson Corporation acted willfully or knowingly by sending the subject fax advertisements to True Health and McLaughlin." (*Id.* at 3.) In making this argument, Plaintiffs relied upon (1) certain deposition testimony of Kari Holloway, Holly Wilson, and David Faupel, (2) the FCC Citation Letter (Ex. No. 35), and (3) Slingshot and Accelero documents (Ex. No. 75). (*Id.* at 3-15.)

Pursuant to the operative scheduling order, the parties exchanged affirmative deposition designations on November 12, 2021, and exchanged objections and counter-designations on November 19, 2021. (ECF No. 493.)

On December 3, 2021, Defendants filed their Trial Brief Regarding Plaintiffs' Individual Claims for Treble Damages ("Opposition Brief") (ECF No. 498).

After the close of business on December 15, 2021, two days before their Reply Brief was due to be filed, Plaintiffs contacted Defendants to request that six new exhibits be added to the Joint Exhibit List. (*See* ECF No. 499 at 13-15 & n.1 (Defendants' objections to Ex. Nos. 118-123, including (118) Plaintiffs' Second Amended Complaint ("SAC"), (119) McKesson Corporation's Answer to SAC ("McKesson Corporation Answer"), and (120) MTI's Answer to SAC ("MTI Answer")). Also on December 15, 2021, Plaintiffs asserted new deposition

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Defendants' Motion To Strike Untimely and New Evidence and Arguments In Plaintiffs' Reply Brief $\,1\,$ Case No. 4:13-CV-02219-HSG

¹ "Ex. No." refers to exhibits listed on the Joint Exhibit List for the Court's Determination of Treble Damages (ECF No. 432-4).

designations for Kari Holloway, roughly one month after the deadlines to exchange affirmative and counter designations had passed. (See, e.g., ECF No. 500-1 at 7-8 & n.1.)

On December 17, 2021, Plaintiffs filed their Reply Brief, which relies in part on the new exhibits and deposition testimony that Plaintiffs first disclosed on December 15, 2021.

Additionally, the Reply Brief raises new arguments that appear nowhere in Plaintiffs' Opening Brief, namely (1) arguments based upon SEC filings that McKesson Corporation owned the Medisoft and Lytec products, (2) arguments regarding the purported nonexistence of an MTI Marketing Department, and (3) arguments regarding whether McKesson Corporation was a party to or bound by the Accelero/Slingshot documents. The bench trial and oral argument on Plaintiffs' individual claims for treble damages is set to occur in approximately two weeks, on January 10, 2022.

Pursuant to Local Rule 7-11(a), on December 21, 2021, counsel for Defendants contacted counsel for Plaintiffs to request that they withdraw the portions of the Reply Brief that contain new arguments or new evidence, including evidence that was untimely disclosed. (*See* Declaration of Bonnie Lau, ¶ 2 & Ex. A.) Plaintiffs refused to withdraw any portion of their Reply Brief (*Id.* ¶ 3 & Ex. B), thus necessitating the instant motion in light of the January 10, 2022 bench trial.

II. ARGUMENT

A. The Court Should Strike Plaintiffs' Untimely and New Evidence and New Arguments.

"New evidence or analysis presented for the first time in a reply is improper and will not be considered." *World Lebanese Cultural Union, Inc. v. World Lebanese Cultural Union of New York, Inc.*, No. C 11-01442 SBA, 2011 WL 5118525, at *6 n.3 (N.D. Cal. Oct. 28, 2011); *accord Law v. City of Berkeley*, No. 15-cv-05343-JSC, 2016 WL 4191645, at *4 n.2 (N.D. Cal. Aug. 9, 2016) (new evidence introduced on reply is untimely); *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1273 n.3 (9th Cir.1993) ("To the extent that the [reply] brief presents new information, it is improper.").

DEFENDANTS' MOTION TO STRIKE UNTIMELY AND NEW EVIDENCE AND ARGUMENTS IN PLAINTIFFS' REPLY BRIEF 2 CASE NO. 4:13-CV-02219-HSG

Likewise, courts generally refuse to consider new arguments that are raised for the first

1 2 time in a reply brief. See, e.g., Cedano-Viera v. Ashcroft, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003) 3 ("[W]e decline to consider new issues raised for the first time in a reply brief."); Cal. Sportfishing 4 Prot. All. v. Pac. States Indus., Inc., No. 15-cv-01482-JD, 2015 WL 5569073, at *2 (N.D. Cal. 5 Sept. 22, 2015) ("Raising new arguments in a reply brief is classic sandbagging, and the Court 6 will not tolerate it."); Krivanek v. Huntsworth Grp. LLC, No. 15-cv-02466-HSG, 2015 WL 7 5258788, at *4 n.2 (N.D. Cal. Sept. 9, 2015) (Gilliam, J.) ("[B]ecause Plaintiff raises this 8

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argument for the first time in her reply brief, the Court does not consider it."). Plaintiffs have improperly cited untimely and new evidence and raised new arguments in their Reply Brief that the Court should strike and decline to consider.

Plaintiffs' Untimely-Disclosed Evidence Is Improper and Should Be 1. Stricken.

In their Reply Brief, Plaintiffs rely on evidence that they did not identify as part of the bench trial record on treble damages until after close of business on December 15, 2021, after Defendants' Opposition Brief had been filed on December 3, 2021. (See Reply Brief at 11:14-12:5 (citing Defendants' Answers); 15:5-11, 15:19, 15:22-26, 16:7 (citing untimely-disclosed testimony of Ms. Holloway); see also ECF No. 499 at 13-15 & n.1 (Defendants' objections to untimely-disclosed trial exhibits); ECF No. 500-1 at 7-8 & n.1 (Defendants' objections to untimely-disclosed deposition testimony of Kari Holloway).) The portions of the Reply Brief at 11:14-12:5, 15:5-11, 15:19, 15:22-26, and 16:7 are improper and should be stricken and disregarded.

The parties filed their original Joint Exhibit List Regarding Treble Damages on August 24, 2021. (ECF No. 432-4.) Plaintiffs did not include the SAC, MTI's Answer or McKesson Corporation's Answer. (See id.) The parties met and conferred to narrow their evidentiary objections. Then, nearly four months later and after Defendants filed their Opposition Brief, Plaintiffs belatedly demanded to add six new exhibits, including the SAC, MTI Answer, and McKesson Corporation Answer. The Court should disregard Plaintiffs' attempt to rely upon these untimely exhibits. (Reply Brief at 11:14-12:5 (citing Defendants' Answers).)

Defendants' Motion To Strike Untimely and New Evidence and Arguments In Plaintiffs' Reply Brief $\,3$ CASE No. 4:13-CV-02219-HSG